Supreme Court of the United States

October Term, 1971

No. 71-16

JOHN M. MITCHELL, Attorney General of the United States, WILLIAM P. ROGERS, Secretary of State,

Appellants,

v.

ERNEST MANDEL, DAVID MERMELSTEIN, WASSILY LEONTIEF, NORMAN BIRNBAUM, ROBERT L. HEILBRONER, ROBERT PAUL WOLFF, LOUIS MENASHE, NOAM CHOMSKY, and RICHARD A. FALK,

Appellees.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

QUESTION PRESENTED

DOES APPELLANTS' ACTION IN REFUSING TO ALLOW AN ALIEN SCHOLAR TO ENTER THE COUNTRY TO ATTEND ACADEMIC MEETINGS VIOLATE THE FIRST AMENDMENT RIGHTS OF AMERICAN SCHOLARS AND STUDENTS WHO HAD INVITED HIM?

STATEMENT OF THE CASE

Decision Below

This appeal arises from a judgment of a three-judge district court sitting in the Eastern District of New York.

The court held, with one judge dissenting, that, as the principal representatives of the public interest embodied in the First Amendment protection of free academic debate and inquiry, American scholars and students have standing to challenge appellants' refusal to allow an alien scholar to enter the country for the sole purpose of participating in specific academic meetings to which he had been invited. These citizens, the court found, suffered and were continuing to suffer irreparable injury as a direct result of the alien scholar's exclusion, which disrupted numerous of their scheduled academic meetings in 1969, and has prevented such meetings from taking place ever since.

This case concerns the application of two integrally related sections of the Immigration and Nationality Act of 1952 (hereinafter "the Act"). Together these provisions operate as a process for the screening and controlled admission of a class of aliens identified by certain political and social beliefs. The process is initiated under §212(a)(28) and as particularly relates to this case, subsections (D) and (G)(v), 8 U.S.C. §1182(a)(28)(D) and (G)(v). These provisions render an alien ineligible to receive a visa if at any time he has advocated or taught "the economic, international, and governmental doctrines of world communism," or has ever written, published, circulated, distributed or displayed literature containing such advocacy or teaching. Aliens within this class are flatly excluded by this section from entering the country as immigrants seeking permanent resident status. But, as a result of the second section of the Act involved in this case, §212(d)(3)(A), 8 U.S.C. §1182 (d)(3)(A), these aliens are *excludable*, but not peremptorily excluded with respect to entry as non-immigrants, temporarily and for specific purposes. Thus, as appellants state, "with respect to an alien excludable under

Section 212(a)(28), the Attorney General in his discretion may waive inadmissibility upon approval of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility."[1] (Gov. Br. P. 18). The statistics set forth in appellants' brief reveal that an overwhelming majority of aliens classified as excludable under subsection (a)(28), and who apply for waivers under §212(d)(3)(A) of the Act, are not excluded, but rather are granted waivers and admitted temporarily by appellants. See Gov. Br. p. 18, n. 24.

The court below found these provisions unconstitutional as applied in the circumstances of this case, where the denial of a waiver to Dr. Ernest Mandel, a citizen and resident of Belgium, was unsupported by any legitimate reason and caused the cancellation or disruption of academic meetings sponsored by Americans. As the court stated:

> "Here the discretion is limited to the 'waiver' aspect of the statute; the executive is given power to admit temporarily those whom the state declares ineligible. . . . Such an executive discretion to invoke or suspend the operation of the general national power to exclude aliens may exist where the uses of the discretion do not impinge on interests protected by the First Amendment, but that it cannot exist here flows from the nature of the rights involved. In this case the admission of Mandel is but a lever by which the constitutional rights of his prospective audience are to be given effect; they, as the articulately concerned portion of the sovereign people, assert a very high title to support Mandel's admission." (J. App. p. 25a).[2]

Appellants unquestionably have power to deny a waiver to any alien when they make a finding that exclusion is neces-

1. "Gov. Br." refers to the Brief for Appellants filed herein.

2. "J. App." refers to the appendix to the Jurisdiction Statement; "App." refers to the separate appendix filed herein.

sary for the protection of national security or the effectuation of foreign policy. If that were the case here, the disruption of academic meetings in this country would merely be, as the court below said, "an unsought incident to attaining the end for which the legislative power exists and is exercised." (J. App. 19a). But that is not the case. No such reasons are advanced as the basis for the waiver denial here. There is no claim that Dr. Mandel was excluded because of subversive affiliations or intentions, or because entry or participation in academic meetings would in anyway endanger national security. Nor is there any claim that foreign policy considerations warrant exclusion; that no such claim can be made is confirmed by the finding of the Department of state that a waiver should be granted.

Instead appellants argue that their power is absolute and requires no justification for its exercise. Rejecting this argument as being tantamont to a claim of an unfettered power to censor what Americans have a right to hear, the court held that the exclusion power, like all powers of government, is subject to limitations imposed by the First Amendment. In view of the appellants position, the court was required to apply only the most fundamental principles of First Amendment law in ruling that suppression of speech by and the free flow of information to Americans can be neither the object, nor the unjustified result of an exercise of the exclusion power.

The cases appellants rely on for support were found inapposite by the court below. In none had this Court accepted the claim of "plenary power" as dispositive of its constitutional obligation and authority to determine the legitimacy of an exercise of the exclusion or deportation power. Furthermore, in none had the First Amendment rights of citizens been presented to or considered by this Court. Rather, this case was held to be like so many others in which this Court has been called upon to resolve a conflict between the First Amendment and an exercise of one of government's great powers. In such cases the Court has required the government to show, at least, that the challenged exercise of power served a legitimate inter-

est, and therefore was not, by purpose or effect, a device for censoring debate. Where, as here, the government neither makes nor attempts to make such a showing the decisions of this Court hold that the First Amendment rights of citizens are entitled to enforcement.

The Facts

The record in this case is comprised entirely of undisputed and uncontroverted evidence introduced by appellees; no evidence was offered by appellants.

The citizens who have brought this action represent the numerous scholars, students and other members of the public who had issued invitations to Dr. Mandel, or were to participate in discussions with him or sought to hear and inquire into his ideas. Each of these citizens is a member of the faculty at a major American university and is engaged in scholarly work in one or several fields of the social sciences. Their interest in Dr. Mandel, and the interest of the many other Americans they represent, arises from the fact that he is an internationally known journalist, scholar and economist, and a noted authority and exponent of Marxist economic theory. His two-volume text entitled *Marxist Economic Theory*, published in 1969, has been acclaimed the major contemporary work in its field.

In the spring of 1969, the Graduate Student Association at Stanford University decided to sponsor a conference on "Technology and the Third World" to be held at the university on October 17 and 18 of that year (App. 34). The conference's format involved various major addresses by noted economists, each of which being followed by a discussion "with a panel composed of people with differing views." (*Ibid.*) On August 20, 1969, the sponsors, with express endorsement by the administration of Stanford University, extended an invitation to Dr. Mandel. (App. 33-34) Dr. Mandel was to be a member of the panel to discuss the keynote address by Professor John Kenneth Galbraith of Harvard and to give the major address on the following day, after which Professor Galbraith would

participate in the panel discussion. The invitation was closed as follows:

> "We certainly will be honored if you can come. We are prepared to offer you $1,000 to cover travel and incidentals. Your opinions will provide a contrast to those of Professor Galbraith and others participating." (App. 35)

On September 8, 1969, after accepting the Stanford invitation, Dr. Mandel applied to the American Consulate in Brussels for a nonimmigrant visa, specifying that he sought temporary admission solely for the purpose of attending the conference.[3]

This application was denied by appellants. Although they were aware of Stanford's interest in Dr. Mandel's visa, appellants made no attempt to notify anyone connected with the University of the visa denial, and in fact, did not notify anyone at all, including Dr. Mandel, until five days after the conference was over. At that time, a representative of the Consulate advised Dr. Mandel by telephone that his application had been rejected. (App. 27)

In a subsequent letter confirming the rejection the Consul advised Dr. Mandel that since 1962 he has been deemed ineligible to receive a nonimmigrant visa under §212(a)(28) of the Act and that his two prior admissions, in 1962 as a working journalist and in 1968 to fulfill speaking invitations at more than 30 American universities, were based on a waiver of ineligibility pursuant to §212(d)(3)(A).[4] (App. 14) The

3. Nonimmigrant visas for temporary admission are limited to aliens seeking entry for one of the purposes specified by 8 U.S.C. §1101(a)(15). A request to attend an academic conference falls within the scope of §1101(a)(15)(H). Dr. Mandel sought admission for six days, from October 14 to October 20, so that he would have the personal convenience of two days travel time before and after the conference.

4. A copy of §§212(a)(28) and (d)(3)(A) was attached to the Consul's letter. (App. 14-21) But, the Consul did not specify under which provision the ineligibility finding was made. Nor did the Consul indicate that this finding had ever been reviewed since 1962.

Consul expressly acknowledged that Dr. Mandel had not been "clearly informed, in 1962, of the refusal and subsequent discretionary procedure being followed," but closed without further explanation that the Department of State had refused to recommend the granting of a waiver in connection with his recent application. (*Ibid*)

During this period, numerous other groups of American scholars and students extended invitations to Dr. Mandel. (App. 26-27) At least six received acceptances, including Professor Stuart Hampshire, Chairman of the Department of Philosophy at Princeton University, who sought Dr. Mandel's participation in two seminars (App. 35-36); Professor Norman Birnbaum, Department of Sociology at Amherst College, who requested that he address a seminar and in addition give a lecture to a general college audience (App. 36); and Professor Robert L. Heilbroner, Department of Economics of the New School for Social Research, who invited him to address the graduate faculty. (App. 27, 39). A student organization at the Massachusetts Institute of Technology received an acceptance of its request that Dr. Mandel participate in a two-day conference at the Institute as a member of a panel along with Professors Galbraith, Noam Chomsky of M.I.T., Daniel P. Moynihan of Harvard, Seymour Melman of Columbia, Nobel Laureate, S. E. Luria, writer, Susan Sontag, and lawyer, Kenneth Cockrel. Another group at Vassar College, sponsoring a two-day conference, scheduled Dr. Mandel as a member of a discussion panel along with Andre Gorz, editor of *Les Temps Modernes*, and Professor Herbert Marcuse, of the University of California at San Diego. Dr. Mandel was also chosen as the keynote speaker by the sponsors of the Socialist Scholars Conference, to be held at Town Hall in New York City. (App. 26)

On October 22, 1969, prior to having been advised of the disposition of his earlier application, Dr. Mandel submitted a new application for a nonimmigrant visa, seeking admission for a period approximately from November 25, 1969 to December 8, 1969, specifically and solely for the purpose of fulfilling

the above described speaking commitments.[5] (App. 44)

The summary denial of Dr. Mandel's visa application for the Stanford Conference triggered concern among the other groups that had anticipated his participation in their academic programs. Counsel for appellees was among several persons contacted by these groups to act as their representatives in seeking an explanation from the Department of State for its action and in obtaining assurances that their meetings with Dr. Mandel would not be prevented.

In response to inquiries, the Administrator of the Bureau of Security and Consular Affairs advised appellees' counsel that the Department of State's decision not to recommend waiver of ineligibility was based on a belief that Dr. Mandel had violated the conditions placed on his admission in 1968. (App. 21) But, as the Administrator stated, the Department was of a different view after further investigation, which revealed

> "that in 1962 and 1968 Dr. Mandel was apparently not informed that a visa was issued only after obtaining a waiver of ineligibility and therefore may not have been aware of the conditions and limitations attached to the visa issuance. In view of this and his assurances, given in connection with his current [October] application, that he will conform to his stated itinerary and purposes, we are reconsidering his case and are discussing it with the Department of Justice." (App. 22)

Despite repeated requests during November, 1969 by representatives of the American academic groups, who stressed the imminency of their planned meetings as the basis for the need to have information concerning the status of Dr. Mandel's visa application, neither the Department of State nor Department of Justice made any reply.

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5. Dr. Mandel attached a proposed itinerary to the application, which set forth his schedule in detail. (App. 46)

But, in a letter dated December 1, 1969 and without prior notice to those whose meetings were scheduled for November, the Consulate informed Dr. Mandel that the Attorney General had refused to grant a waiver recommended by the Department of State. (App. 49) As a result, the meetings scheduled for December, like the November meetings, were abruptly cancelled or were held in Dr. Mandel's absence.[6] (App. 30)

Subsequently, the Department of State advised the Bertrand Russell Foundation (co-sponsor of the Socialist Scholars Conference) that ". . . in the interest of free expression of opinion and exchange of ideas, [it had] recommended a waiver for Dr. Mandel. The Immigration and Naturalization Service (acting for the Attorney General) responded that a waiver was not warranted." (App. 48-49)

In response to further inquiries, a representative of the Immigration and Naturalization Service advised appellees' counsel of its view, first, that Dr. Mandel is ineligible for a visa because of his "subversive affiliations" and second, that he is not entitled to a waiver because his activities during the 1968 visit "went far beyond the stated purposes of his trip . . . and represented a flagrant abuse of the opportunities afforded him to express his views in this country . . ." (App. 68)

Appellants concede the inaccuracy of the first contention[7] and place no reliance on the second.

Dr. Mandel's visa ineligibility is based solely on his alleged speech and writings advocating or teaching "economic, international and governmental doctrines of world commu-

6. When the sponsors of the Socialist Scholars Conference realized, after waiting to the last moment, that Dr. Mandel would not be permitted to attend, they resorted to the only available alternative and presented the keynote address to the Town Hall audience by tape recording. They also arranged, at great expense, for Dr. Mandel to participate in discussions by trans-Atlantic telephone hook-up. But a circuit failure prevented this. (App. 51)

7. See appellants' Jurisdictional Statement, p. 3; J. App. 5a.

nism."[8] (App. 86-87; J. App. 8a)

Appellants' position on the question of whether Dr. Mandel violated his visa conditions in 1962 is that the question is "irrelevant" because "[t]he Attorney General is not required to justify his finding that the applicant should not receive a waiver." (App. 88)

Appellees principal challenge was directed at the application of §§212(a)(28)(D and (G)(v) and §212(d)(3)(A) to the facts of this case.[9] Appellees maintained that where their First Amendment rights and those of other citizens are vitally affected by an Executive decision to exclude Dr. Mandel, such decision can not constitutionally be made without any basis or justification; that the statutory provisions involved should not be construed to authorize the arbitrary abridgment of protected interests, and, if so construed, would be unconstitutional as here applied.

The court ruled that "[s]uch executive discretion to invoke or suspend the operation of the general national power to exclude aliens may exist where the uses of discretion do not impinge on interests protected by the First Amednment . . ." (J.

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8. We have never conceded that Dr. Mandel has engaged in the advocacy defined by §§101(a)(40) and 212(a)(28)(D) and (G)(v) of the Act. It is and has been our position that these provisions are so vague and uncertain in their meaning and scope that no one can determine who is or is not included. They compass any expression of political, social or economic philosophy that government authorities might disfavor. These provisions therefore were challenged as investing appellants with an unlimited power of censorship over what Americans may hear. (App. 10-12) We do not contest the fact that appellants can and do conclude that Dr. Mandel's Marxist economic philosophy falls within the scope of these vague provisions.

9. In addition to challenging on First and Fifth Amendment grounds, the appellees also sought to restrain their enforcement against Dr. Mandel, becaue (i) the terminology of §212(a)(28)(D) and (G)(v) was so vague and overbroad and the discretionary power delegated to the Attorney General by §212(d)(3)(A), so unlimited, that these provisions invested appellants with unfettered power to prevent Americans from hearing any expression of political, social, economic or other intellectual opinion which has not obtained Government approval; (ii) the provisions operate to bar expression of opinions relating only to one side of the spectrum political philosophies; (iii) the provisions fail to provide adequate, or indeed, any procedural safeguards and ascertainable standards; and (iv) there is not a scintilla of evidence to support the findings underlying the Attorney General's refusal to accept the Secretary of State's favorable waiver recommendation.

App. 25a), but "the First Amendment peremptorily forbids equating the implied power to exclude aliens in the interest of national security and the even conduct of international affairs with a power to abridge the freedom of speech, press and peaceable assembly." (J. App. 26a) Finding that appellants had offered nothing to suggest that Dr. Mandel's exclusion served any legitimate interest, whether in the realm of national security, foreign relations or otherwise, the court declared that "[t]he challenged parts of the Act as here applied . . . do not reflect a genuine exercise of the implied power of alien exclusion." (J.App.26a) A judgment was therefore entered enjoining appellants from "implementing or enforcing §§212(a)(28) and 212(d)(3)(A) . . . so as to deny plaintiff Mandel admission to the United States as a nonimmigrant visitor." (App. 89)

SUMMARY OF ARGUMENT

This case concerns various, unrelated academic meetings, called by American scholars and students from many of the nations most distinguished universities. These meetings, which included classroom seminars, lectures and large-scale conferences, involved discussions of political, social and economic questions relating to matters of contemporary and historical importance. One of the persons invited to participate in these meetings was Dr. Ernest Mandel, who is a citizen and resident of Belgium. But, without prior warning or any stated reason, appellants refused to grant a waiver under §212(d)(3)(A) of the Act, and barred Dr. Mandel from entering the country temporarily to attend these meetings. As a result of this action many of the scheduled meetings were abruptly cancelled or were held in an abridged format reflecting Dr. Mandel's absence.

The court below ruled that appellants' wholly unjustified refusal to grant a waiver violated the First Amendment rights of the American citizens to hold free and open academic meetings and discussions and to receive uncensored information from diverse and antagonistic sources. These rights, the court

concluded, are of the most fundamental nature, since they ensure the ability of the people to govern themselves. They cannot be abridged by the exercise of any power of government in the absence of a showing that the action has been taken in furtherance of a legitimate governmental interest. The court rejected any assumption that there exists a government power in any area that can be invoked at the will of offcials that cancels-out the first Amendment rights of citizens.

Appellants seek reversal here. They do not assert any justification, in the realm of foregn affairs, national security or otherwise, for their actions. Rather their position is that Congrers' exclusion of Dr. Mandel is unreviewable regardless of its impact on the First Amendment rights of citizens. This argument is fundamentally eroneous in several respects:

First, Congress has not excluded Dr. Mandel from the temporary admission he seeks. Appellants depict §212(a)(28) as imposing an absolute ban on entry like §§212(a)(27) and 212(a)(29). But, the contrary appears plainly from the face of the statute, its history and its application. Temporary admission of aliens like Dr. Mandel is specifically authorized by Congress. By contrast to §§212(a)(27) and (a)(29), the waiver provision in §212(d)(3)(A) is expressly applicable to §212(a)(28). Indeed, Congress explicitely rejected proposals to accomplish what appellants would by their argument here. Congress refused to enact the bills reported by its committees that treated §§212(a)(27), (a)(28), and (a)(29) alike — absolute and exempted from the waiver provision. Moreover, the legislative history reveals that Congress affirmatively intended that waivers be granted where admission serves the public interest. There is no doubt that Dr. Mandel's admission serves the public interest. The Department of State specifically recommended a waiver because entry would serve "the interest of free expression of opinion and exchange of ideas. . . ." Dr. Mandel was admitted in 1968 specifically for the purpose of attending academic meetings at more than 30 universities. Congress has contemplated precisely what the actual practice is under these provisions. Appellants' reports confirm that

waivers are regularly granted where entry serves the public interest. The vast majority of aliens classified under §212(a)(28) who apply for waivers are in fact admitted.

In sum, the statutory provisions involved here delegate the exclusion power to appellants, to be exercised on a regular, case-by-case basis, not arbitrarily or for wide-scale exclusion. By these provision Congress has established a process for screening aliens in Dr. Mandel's class, to determine whether entry would serve the public interest, and if so, whether there is any basis or countervailing reason for the alien's exclusion.

Second, appellants argument reflects a strategy to avoid responsibility for their actions. If Congress had included every alien classified under §212(a)(28) then the findings by Congress would provide justification for each alien excluded. But Congress has not done so; appellants therefore must have specific justification for excluding an alien, upon whose admission depends the free exercise of First Amendment rights by citizens.

The only theory upon which appellants argument can be based, although not directly stated here, is that the power to grant or deny a waiver can be exercised arbitrarly or for the specific purpose of supressing academic meetings called by Americans and the expression of ideas they have a right to hear. This interpretation of the waiver power is contrary to the intent of Congress and the requirements of the First Amendment. As such appellants' refusal to grant a waiver to Dr. Mandel and to authorize his admission, without valid reason to justify this refusal, exceeds their statutory delegation of power and the proscriptions imposed by the First Amendment.

Third, the cases appellants rely on to support their position that an exercise of the exclusion power is unreviewable, are inapposite. Those cases involved assertion of rights by aliens only; none of the cases involved a challenge based on the First Amednment rights of citizens. Excluded aliens have no First Amednment rights. Moreover, each case involved a request by aliens to enter or remain in the country as residents. Therefore, unlike here, the discrete issue of the First Amend-

ment right to have an alien attend specific academic meetings was not and could not be presented. In other words, in those cases, unlike here, citizens could not even argue that they had specific and crystalized First Amendments interests at stake. The cases applicable here are those in which the Court has consistently ruled that where the exercise of even the greatest of governmental powers — the war power, the power to conduct foreign relations, or the power to safeguard national security — abridges the First Amednment rights of citizens, the courts have power, indeed, the obligation and duty to determine whether the government action is justified as being in furtherance of a legitimate interest and not wholly arbitrary or specifically directed at the suppression of protected liberties.

ARGUMENT

AMERICAN CITIZENS HAVE A RIGHT GUARANTEED BY THE FIRST AMENDMENT TO MEET WITH AN ALIEN FOR FREE AND OPEN ACADEMIC DISCUSSIONS WHICH CANNOT BE PREEMPTED BY THE ALIEN'S EXCLUSION WHERE NO LEGITIMATE PURPOSE IS SERVED THEREBY.

The narrow question in this case can be best understood by deliniating what is not at issue.

Thus, appellants do not contest the standing of the appellees to enforce their rights to engage freely in academic debate and inquiry and to vindicate the public interest in the uncensored flow of information and ideas. For there can be no question that appellees have suffered direct and irreparable injury to their First Amendment rights, in view of the fact that exclusion of Dr. Mandel abruptly curtailed their scheduled meetings, which were called solely for the purpose of academic discussions. Appellees, moreover, are clearly within the zone of protection afforded by the First Amendment, since they sue to enforce their rights, individually and as members of the American public, and assert none on the part of the invited alien.

Appellants acknowledge, furthermore, that Dr. Mandel was invited to attend genuine academic meetings at various universities and public forums in this country, and that these meetings were the only purpose for his entry, which for the Stanford Conference would have lasted six days and for the subsequent invitations no more than eight or nine. This, then, is not a case where the alien seeks entry for general purposes of business or pleasure (see 8 U.S.C. §1101(a)(15)(B)) or as a resident immigrant, to live here and have the advantages of our hospitality.

Nor does this case involve a question of the power of Congress to declare the expulsion or exclusion of an alien who is or was a member of the Communist Party or any affiliated or similar organization.

Again, this is not a case where the Executive has declared that an alien's exclusion is required by foreign policy considerations. In fact, a contrary declaration appears expressly in the record. The Department of State, exercising its Congressionally assigned function in the waiver process of reviewing the foreign policy aspects of Dr. Mandel's application, recommended the issuance of a waiver and a nonimmigrant visa.

Furthermore, this is not a case where the alien's temporary entry has been declared by appellants to be in any way "prejudicial to the public interest, or [that it would] endanger the welfare, safety, or security of the United States." Such aliens are excluded under all circumstances by § 212(a)(27) of the Act, which is concededly not applicable to Dr. Mandel. Nor is Dr. Mandel a member of any class of aliens, with respect to which the President has proclaimed, under the authority delegated to him by §212(f) of the Act, that entry of such aliens "would be detrimental to the interests of the United States." Indeed, Dr. Mandel's temporary admission is not peremptorily barred by any directive of the Executive.

Appellants, assert that "[t]he First Amendment's guarantee of freedom of speech does not include the power to require the admission of an alien Congress has refused to admit and it does not confer authority in appellees to determine which

aliens should enter the country." (Gov. Br., p. 39). But this is an effort to side-step the real issue in the case.

Appellees do not question the proposition, as stated by the Court in *Galven v. Press*, 347 U.S. 522, 530, that "[t]he power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign policy and national security." Likewise, when Congress or appellants, in the lawful exercise of delegated authority, decide to exclude an alien to achieve a national security or foreign policy objective, First Amendment rights of citizens cannot override that decision. That is so, however, not because citizens who anticipate the alien's participation in their academic meetings are without First Amendment rights. Rather, it is so because exclusion pursuant to a legitimate government interest satisfies the controlling First Amendment standards. As the Court has held:

> "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377.

This is not a case in which Congress has excluded Dr. Mandel. Had Congress enacted a blanket exclusion of every alien in the class described by §212(a)(28)(D) and (G)(v) this would be an entirely different case, for then the general justification applicable to all aliens in the class might be asserted to satisfy First Amendment requirements. Congress instead expressly decided to designate a class of aliens who are excludable, and has vested a waiver power in the Executive

to be exercised on a case by case basis.[10] It is the unreasonable and unjustified exercise of that power which is the issue here.

Nor is this a case in which appellants, after screening an application, as Congress has directed, determined that there are countervailing reasons warranting exclusion. The First Amendment rights of citizens would not override action taken in furtherance of a valid government interest. See *United States v. O'Brien, supra.*

What remains, therefore, is a narrow question: Where academic meetings sponsored by Americans and the public interest in the free flow and exchange of information depend directly on the admission of an alien, does the First Amendment require appellants to have a legitimate reason for deciding to deny a waiver and to exclude the alien?[11]

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10. Congress expressly rejected proposed versions of the Act that would have made the waiver provision in applicable to subsection (a)(28), as well as to subsections (a)(27) and (a)(29). See e.g., S.Rep. No. 1515, 81st. Cong., 2d Sess. 781-801 (1950).

11. The court below decided this question without reaching the issue of whether in substance the waiver refusal was arbitrary. That issue was foreclosed when appellants diavowed reliance on the alleged violation of visa conditions by Dr. Mandel in 1968, and failed to advance any other justification for their action. Appellants therefore do not contend that Dr. Mandel should be barred from attending academic meetings in this country because his presence, or anything he would say, poses a danger to national security or would be prejudicial to the public interest. Nor is there a claim that his admission will adversely affect our foreign relations with Belgium, his native country, or any other nation. Indeed, the Department of State has declared that no foreign policy considerations require exclusion. There is also no claim even that appellants lack sufficient information to make a determination of the security risk involved in Dr. Mandel's entry, that Dr. Mandel is uncooperative in providing information, that adequate visa conditions cannot be implemented, that there is reason to believe Dr. Mandel will not abide by such conditions, or that divulgence of the reason for his exclusion would itself harm the national interest. In short, no reason is offered and for all that appears, none exists, for appellants' decision to refuse to issue a waiver under §212(d)(3)(A).

I

The First Amendment Protects the Right of American Citizens to Receive Information from and to Hold Academic Meetings with an Alien

The court below held:

"The concern of the First Amendment is not with a non-resident aliens' individual and personal interest in entering and being heard, but with the rights of the citizens of this country to have the alien enter and to have him explain and seek to defend his views; that as *Garrison* and *Red Lion* observe, is the essence of self-government." (J. App. 22a-23a).

The freedom of American citizens to receive information and ideas, which this Court has said is "fundamental to our free society,"[12] is "nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487.[13] Like the press, American universities play an essential role in our system of gathering, evaluating and disseminating information from diverse sources. By acting as "the great interpreters between the government and the people," both institutions ensure the People's right of self-governance. *Grosjean v. American Press Co.*, 297 U.S. 233, 250. "These pages need

12. *Stanley v. Georgia*, 394 U.S. 557, 564; see also *New York Times Co. v. United States*, 403 U.S. 713, *Red Lion Broadcasting Co. v. FCC*, *supra*; *Griswold v. Connecticut*, 381 U.S. 479, 482; *Lamont v. Postmaster General*, 381 U.S. 301, and at 307-308 (Justice Brennan, joined by Justices Goldberg and Harlan concurring); *Martin v. City of Struthers*, 319 U.S. 141, 142-143; *Marsh v. Alabama*, 326 U.S. 501, 508-509.

13. See also *Epperson v. Arkansas*, 393 U.S. 97.

In numerous recent decisions, the right to hear has been successfully asserted by representatives of university audiences to void regulations imposed by university administrators which, by their design or sweeping effect, barred entry to classrooms and lecture halls by invited, outside speakers, whose views did meet with official approval. See *Molpus v. Fortune*, 432 F.2d 916 (5th Cir. 1970); *Pickings v. Bruce*, 430 F.2d 595, 598-599 (6th Cir. 1970); *Brooks v. Auburn University*, 412 F.2d 1171, 1172 (5th Cir. 1969); *ACLU v. Radford*, 315 F.Supp. 893 (E.D. Va. 1970); *Smith v. University of Tennessee*, 300 F.Supp. 777 (E.D. Tenn. 1961); *Snyder v. Board of Trustees*, 286 F.Supp. 927 (D. Ill. 1968).

not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities." *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (Justice Frankfurter concurring). "The classroom is peculiarly the 'market place of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Keyishian v. Board of Regents*, 385 U.S. 589, 603; see also *Sweezy v. New Hampshire*, 354 U.S. 234, 250.

Appellants recognize the impact of their decision on the academic freedom of American citizens and on the right of the public generally to the free flow of information. They must also be aware that their action evinces a lack of concern for these First Amendment rights, particularly by the delays that attended notice of their decisions, the suggestion here that trans-Atlantic telephone hook-ups or prepared texts are substitutes for classroom or conference discussions, and the fact that the decision to refuse a waiver was apparently not made by the Attorney General, but rather by an employee of the Immigration and Naturalization Service.

Yet, although academic meetings in fact were and continue to be prevented by Dr. Mandel's exclusion, appellants nevertheless maintain that American citizens have not been deprived of any First Amendment rights. They argue not that there was sufficient government interest to warrant Dr. Mandel's exclusion, but rather first, that "section 212(28)(D) and (G)(v) in no way restrains or inhibits them [appellees] from speaking or publishing," and second, "action not speech is being regulated." (Gov. Br., p. 30). Neither argument has merit.

The first argument by way of attempted mitigation is a concession that Dr. Mandel's exclusion has caused substantial injury to the First Amendment rights of citizens. Appellants point out that appellees are not prevented from reading Dr. Mandel's books and articles, listening to tape recorded speeches, talking to him over a trans-Atlantic telephone hook-up or

visiting him abroad. But we cannot assume that appellants are contending that "technological developments" and the mere reading of or listening to prepared texts is a substitute for classroom discussions. For what appellees have lost by Dr. Mandel's exclusion is the very essence of academic freedom. As a learning process and as a means for receiving, exchanging and evaluating ideas, there is nothing comparable in academic study to the face to face discussion that takes place in a classroom.[14] The classroom, like the courtroom, provides a setting where views may be tested by sharp and penetrating inquiry, where the answers to questions may be judged both on their precise substance and the responsiveness and sincerity with which they are given, and where new ideas and approaches are often generated by the excitement of discussion. Why else do private and public systems of education in this country devote such enormous resources to the classroom? And we note a similar commitment of resources by the judiciary in this country to face-to-face debate. Just as this Court has found written submissions generally to be no substitute for oral argument, *Goldberg v. Kelly*, 397 U.S. 254, 289, so, too, the availability of Dr. Mandel's books or tape recordings in this country cannot replace his presence in a classroom or conference.

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14. This Court has recognized that personal contacts with foreign scholars is invaluable to the growth and progress of American scholarship. See *Kent v. Dulles*, 357 U.S. 116, 126-127; *Sweezy v. New Hampshire, supra* at 250. To grant appellants' unlimited authority to permit or refuse admission capriciously or for the actual purpose of suppressing debate, would give the government a strangle hold on important sources of information in every area of academic inquiry. See *Hearings Before the President's Commission on Immigration and Naturalization*, 82d Cong., 2d Sers. 408, 1464 (1953).

The crucial and irreplaceable role filled by classroom and conference discussion in the communication and thorough analysis of ideas in academic study has been frequently documented. See Biehler, *A Handbook of Psychology Applied to the Art of Teaching*, 207 (1966); Seagoe, *The Learning Process*, 60-61, 80-84, 142-143 (1970); Erickson & Kind, *A Comparison of Visual and Oral Presentation*, 6 School & Society, 146, 147-148 (1917); Bugelski, *The Psychology of Learning Applied to Teaching*, 127, 130, 265-266 (2 ed. 1971); Lindgren, *Educational Psychology in the Classroom*, 153, 318-319 (1967).

See also Heisenberg, *Physics and Beyond, Encounters and Conversations* (1971) (*passim*), relating the significant breakthroughs achieved in a series of scientific conferences held in the 1920's that led to the discoveries upon which modern physics is founded.

Obviously, trans-Atlantic hook-ups and tape-recorded addresses do not provide the crucial opportunity for face-to-face discussions. The suggestion that those interested in meeting with Dr. Mandel can do so abroad is so plainly impractical as to merit no further discussion.

Equally, without support is appellants' second argument, that by exercising their control over the "action" upon which academic meetings depend, they can prevent those meetings at will without implicating the First Amendment rights of citizens. It is significant in this regard that appellants have left to implication, but have not directly stated that such control can be employed for the very purpose of aborting academic meetings and silencing the expression of views Americans have a right to hear. But, the decisions of this Court leave no doubt that the right to receive information is not to be defeated on a claim by the government that it is merely controlling the "action" by which the information is received.

Here, as the court below said, "the admission of Mandel is but a lever by which the constitutional rights of his prospective audience can be given effect . . ." (J. App. 25a) But the power to control that lever cannot be equated with the power to censor. It is firmly established that "the mere fact that speech is accompanied by conduct does not mean that the speech can be suppressed under the guise of prohibiting the conduct." *Food Employees v. Logan Plaza*, 391 U.S. 308, 323.

Just as the free flow of information to the public cannot be impeded by unreasonable restrictions on the "action" involved in the circulation and distribution of newspapers and leaflets, *Lovell v. Griffin*, 303 U.S. 444, 452, so, too, the flow of information from an equally important source, the nation's universities, cannot be impeded by unreasonable restrictions on the "action" involved in attending academic meetings. See *Sweezy v. New Hampshire, supra;* and the cases cited *supra*, p. 18, n. 13, involving restrictions on the right of campus audiences to hear outside speakers. "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren

market place of ideas that had only sellers and no buyers." *Lamont v. Postmaster General*, 381 U.S. 307, 308 (Justice Brennan concurring).

Lamont involved the undisputed power of the government to control the entry of mail from foreign sources. The government's regulation was concerned solely with the entry and delivery of the mail. Action, not speech, was being regulated, although, as here, the right to receive information was directly affected. Clearly, in *Lamont* the alien sender possessed no constitutional right whatsoever to have his mailings of "communist political propaganda" enter this country or be delivered. On these facts, the Court ruled that regulation of such mail which places an unjustifiable burden on the American addressee's right to receive information violates the First Amendment. See also *United States v. Hiett*, 415 F.2d 664, *cert. denied* 397 U.S. 936.

Inexplicably, appellants contend that *Lamont* did not involve the right to receive information at all, but only the petitioner's own right to use the mails in sending for the detained literature. (App. B., p. 33) The Court's clear holding refutes this argument:

> "The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. Just as the licensing or taxing authorities in the Lovell, Thomas, and Murdock cases sought to control the flow of ideas to the public, so here federal agencies regulate the flow of the mail. 381 U.S. at 306.

The burden imposed on the right to receive information by appellants' application of the statutes involved here is far greater than in *Lamont*. In *Lamont*, the statute applied generally to all addressees and permitted no discrimination among them. It further required the Postmaster General to forward the detained mail immediately upon request by the addressee. By contrast, appellants claim an absolute and unreviewable

power to select at their will the academic meetings they will or will not permit, and to not merely delay, but to bar permanently the alien's attendance at these meetings. Moreover, there is no danger here of Americans being subjected to a torrent of unsolicited information, as there was in *Lamont*, where Congress may have been seeking to protect the American addressees from receiving unwanted mail. Cf. *Rowan v. Post Office Dept.* 397 U.S. 728. Dr. Mandel has been specifically invited to speak by members of the American academic community and his audience will be composed exclusively of those who choose to hear him.

Red Lion Broadcasting Co. v. FCC, supra is in the same vein as *Lamont*. Clearly, as *Red Lion* holds, "[n]o one has a First Amendment right to a license or to monopolize a radio frequency . . ." (395 U.S. at 389), but equally clear is the Court's declaration that neither Congress nor the FCC can regulate a licensee's use of his frequency in such a way as to abridge the right of listeners to receive information. *Id.* at 390.[15]

"Action" is undoubtedly the subject of the controls imposed by Congress under the Trading with the Enemy Act, 50 U.S.C. App. §5(b). Regulations adopted pursuant to that Act require the detention of publications mailed from such countries as China and North Vietnam, until the American addressees deposit payments for those publications into blocked accounts. But, as the Court of Appeals for the Second Circuit held in *Teague v. Regional Commissioner*, 404 F.2d 441 (1968) *cert. denied*, 394 U.S. 977, the Act and the regulations must satisfy First Amendment standards. The court rejected a

15. Likewise, while the state may protect the privacy of those residing on private property, it may not regulate entry unreasonably or for the purpose of impeding the flow of information to those residents. See *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420; *Martin v. Struthers*, 319 U.S. 141, 143-144; *Tucker v. Texas*, 326 U.S. 501. Again, in *United States v. Thirty-Seven Photographs*, 402 U.S. 363 and *Blount v. Rizzi*, 400 U.S. 410, the Court declared that no one has a right to engage in the commercial mailing or importation of obscene literature, but held that the First Amendment rights of potential purchasers requires administrative and judicial review procedures that accord with the standards established in *Freedman v. Maryland*, 380 U.S. 51.

claim of constitutional violation after rigorous scrutiny of the purposes and application of the Act and regulations. It ruled on the basis of a showing by the government, such as it fails and refuses to make in this case, that, in practice, the detention period was very short, that the Customs regulations were not applied for the purpose of restricting "the flow of information or ideas" and that any such restriction, as distinguished from *Lamont*, was merely incidental to the achievement by narrowly limited means of a "proper, important and substantial" government objective. Furthermore, as the court found, the Customs regulations were particularly solicitous of First Amendment interests in providing for the unrestricted receipt of foreign publications by universities and libraries, "institutions that can give the publications the broadest exposure to the public and that can make the greatest use of them for purposes of study . . ." 404 F.2d at 446 n. 6.

The decisions involving the exclusion of outside speakers from university classrooms and lecture halls are indistinguishable from this case. See *supra*, p. 18, n. 13. Contrary to appellants' assertion (Gov. Br. p. 32, n. 41) members of the general public do not have a First Amendment right to enter onto and use university facilities to express their views. Those cases, like the present one, were concerned exclusively with the right of members of the university community to hear an outside speaker. That right is sustained where no countervailing reason of safety, health or security warrants the speaker's exclusion.

Contrary to appellants' contention the decision below does not conflict with the Court's ruling in *Zemel v. Rusk*, 381 U.S. 1. There is no dispute with the proposition stated in *Zemel*, that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." 381 U.S. at 17. But while the "right to gather information" may be restrained for valid and compelling reasons, as may any other exercise of First Amendment rights, it does not follow that the right may be restrained without justification or for the purpose of preventing Americans from receiving the information they seek

and are entitled to have. This was made clear in *Zemel*, where it was expressly found that the ban on issuance of passports for travel to Cuba was based on "foreign policy considerations affecting all citizens," which were characterized by the Court as the "weightest considerations of national security." 381 U.S. at 13, 16.

The Court's analogy in *Zemel* to the power to prevent unauthorized entry into the White House is revealing. 381 U.S. at 17. In *Zemel*, unlike the present case, the justification for the government action and therefore the absence of an enforceable First Amendment right, was self-evident from the foreign policy considerations involved, including the existence of extreme hostility between this nation and Cuba, the fact that restrictions on passport validations were instituted in the direct aftermath of the Cuban missile confrontation and the severance of diplomatic relations with Cuba, and the determination by our Government and other members of the Organization of American States that travel restrictions were necessary to combat subversion of Western Hemisphere countries. Restrictions in furtherance of legitimate government interests do not violate the First Amednment. *United States v. O'Brien, supra.*

It is therefore, absurd to argue, as appellants have, that if the First Amendment requires Dr. Mandel's admission, then any citizen can compel the admission of beggars, the diseased, criminals or any other class of aliens. No one suggests that the First Amendment overrides the clear justification for excluding disease carrying aliens, for example. As the Court held in *Martin v. Struthers, supra* at 143:

> "This freedom [of speech and press] embraces the right to distribute literature, Lovell v. Griffin, 303 U.S. 444, 452 and necessarily protects the right to receive it. . . . Yet, the peace, good order, and comfort of the community may imperatively require regulation of the time, place and manner of distribution. *Cantwell v. Connecticut*, 310 U.S. 296, 304. No one

supposes, for example, that a city need permit a man with a communicable disease to distribute leaflets on the street or to homes . . ."

The point of this case is that *there is no justification for Dr. Mandel's exclusion.* Unlike *Zemel,* and such cases as *Galven v. Press, supra,* there is no blanket prohibition involved. Thus, there exists no general justification applicable to every alien in Dr. Mandel's class warranting automatic exclusion. Nor is this a case where the justification is self-evident, as where an alien possesses such characteristics as a communicable disease or criminal tendencies, or where his mere presence would be disruptive, as in the case of an unauthorized visitor to the White House.

Also, by contrast to *Zemel,* the rights involved here are those of academic freedom and the public interest in the free flow of information. *Zemel* claimed a "right to gather information" so that he could "satisfy [his] curiosity . . . and [become] a better informed citizen." 381 U.S. at 4, 17. For this reason, too, *Zemel* and this case are strikingly different from each other. First, the petitioner in *Zemel* asserted an exceedingly personal interest that was only very remotely, if at all related to the public interest that is directly at stake in this case. Second, the Court has consistently held that the First rights asserted here — the right to speak, listen, and debate — are "fundamental," indeed basic to the ability of the people to govern themselves. The "right to gather information" has not received similar recognition. For example, in *New York Times Co.* v. *United States,* 403 U.S. 713 it was not even argued that the right to gather information would support the illegal acquisition and possession of classified government documents. Rather, the position of the newspapers rested solely on the right of the public in the free flow of information, which forbids an injunction against publication of such documents, in the absence of a clear showing of imminent danger to the national interest.

II

The Statutory Scheme Involved Here Creates A Screening Process For Aliens Classified Under §212 (a) (28) (D) And (G) (v) Which Provides For Entry In The Public Interest Under The Waiver Provision, §212 (d) (3) (A) And Therefore, On Its Face, Is Consistent With The Requirements Of The First Amendment.

Appellants next argue that Congress, not they, excluded Dr. Mandel. The only question, according to appellants, is "whether Congress' exclusion of aliens such as Dr. Mandel violates the First Amendment." (Gov. Br. p. 4) Appellants failure to mention their denial of Dr. Mandel's waiver application is particularly striking in view of the administrative practice disclosed in their brief. Based on this information, it is clear that the waiver provision is an integral part of the statutory mechanism Congress created to effectuate its purposes. In fact, the vast majority of aliens classified under §212(a) (28), who apply for waivers, are admitted. In 1969, for example, out of a total of 4,993 waiver applications only 9, including Dr. Mandel's, were rejected. The following year only 4 out of 6,193 waiver applications were denied.[16]

Appellants attempt to support their argument with a quotation from the opinion below that is strikingly distorted by a selective deletion. (Gov. Br. p. 35) The Court did not decide that §212(a) (28) (D) and (G) (v) and §212(d) (3) (A) were unconstitutional on their face. Its holding is clear when the missing words are added: "The challenged parts of the Act *as here applied* do only the latter forbidden thing [prevent speech for

16. Appellants' statistics do not, however, make clear how many aliens in Dr. Mandel's specific class, §212(a) (28) (D), were refused a waiver. Nor do they show how many aliens were denied a waiver after a recommendation by the Department of State. Given the primary concern of Congress with Communist party affiliates, Gordon and Rosenfield, *supra* at §2.47(c), p. 2-225, and the firmness of the State Department's recommendation in this case, it is safe to assume that exclusion of an alien in Dr. Mandel's position is a very rare, if not a unique phenomenon.

no lawful purpose] and do not reflect the genuine exercise of the implied power of alien exclusion." (Emphasis added)

The purpose behind appellants' strategy is apparent. If Congress had excluded from temporary admission, all aliens in Dr. Mandel's class, there would be no need of a specific justification for the exclusion of each member of the class. Treating the waiver provision as nonexistent, as appellants do, it can then be argued as appellants have, that the justification for Dr. Mandel's exclusion as well as the exclusion of all other members of his class is provided by subsections (D) and (G) (v) of §212(a) (28), which are themselves "an expression of the foreign policy of the United States and are also based on considerations of national security." (Gov. Br. pp. 35-36). In thus casting the case as a direct clash between §212(a) (28) (D) and (G) (v) and the First Amendment, appellants seek to shield their own action from review.

Appellants approach would have the Court treat subsection (a) (28) as if it were written and intended to be applied like subsections (a) (27) and (a) (29) of §212. The latter are blanket exclusion provisions as to which the waiver provision is specifically made inapplicable. Aliens covered by these provisions are excluded automatically and absolutely. The justification for the exclusion of all such aliens appears in the Congressional findings.

This case is quite different from the one appellants would like it to be. Congress, by providing a waiver of ineligibility, contemplated the normal administrative practice — that each application for admission from aliens classified under subsection (a) (28) would be treated on its individual merits. Rather than providing a general justification for exclusion of all aliens in the class, the provisions involved constitute a delegation of exclusion power to appellants. They are charged with the responsibility of screening each application for a waiver and of determining as to each whether admission serves the public interest, and if so, whether countervailing reasons nevertheless justify exclusion.

Appellants ignore the waiver provision and their action

under it for another reason. By their silence they avoid stating directly, what they have stated below, that they interpret the waiver auhority as a completely unlimited power, unrestrained by any Congressional or Constitutional mandates. Under this interpretation, citizens would have no constitutional basis to complain in court, even if Dr. Mandel were denied a waiver as a means of punishing some of those Americans who invited him for their outspoken opposition to the government's policy in Vietnam. Nor would there be a basis for complaint if the waiver was denied for the purpose of preempting academic discussions. Following the logic of their position, appellants would claim an unreviewable power to express anti-Catholic sentiments, for example, by excluding under the provisions involved here, alien Catholic clerics invited to participate in American services.

To state these possible applications of appellants' position, which upon the record in this case do not seem implausible, is to demonstrate that their interpretation of the waiver power is contrary to what Congress intended and what the First Amendment requires.

Never has this Court sustained such a grant of unfettered power to censor what Americans may say or hear. As Justice Whittaker said in *Staub v. City of Baxley*, 355 U.S. 313, 322:

> "It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official — as by requiring a permit or license which may be granted or withheld in the discretion of such official — is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."

See also *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151.

Nor can it be concluded that Congress intended to delegate such a power, which would in effect be a negation of its own

power to declare immigration policy. Moreover, even if there were no well settled preference for construing Congressional enactments in harmony with First Amendment principles, such a construction would be compelled by the clear wording, history and administrative application of the provisions involved. But it also should be noted that the Court has given repeated and strong emphasis to the "cardinal principle" that it will "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62; see also *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369. As a corrollary to that principle the Court has stated emphatically that in construing legislation, it will not assume Congress was indifferent or hostile toward First Amendment liberties. See *Schneider v. Smith*, 390 U.S. 17, 26-27; *Greene v. McElroy*, 360 U.S. 474, 507; *United States v. Romley*, 345 U.S. 41, 46-47.

Appellants interpretation is refuted by the very structure and wording of §212. Obviously, where an alien would on entering engage in activities "prejudicial to the public interest" or worse, Congress quite naturally has forbidden such entry peremptorily. See §§212(a)(27) and (a)(29). No waiver provision is applicable. But where Congress found that certain political affiliations or beliefs raise doubts about the aliens' admission, but are not conclusive evidence that entry in every case, even temporarily, would be harmful, it provided for a waiver of ineligibility. Clearly, Congress does not have to take the risk of allowing such aliens to live here permanently. Nor could American citizens claim a First Amendment right to have an alien admitted as a resident, not only because of the long-term dangers Congress has power to avoid, but also because resident status involves far more than the limited activity of participating in specific academic discussions. But, consistent with First Amendment interests Congress provided for temporary admission of aliens like Dr. Mandel. Of course, because Congress has a basis for concerning itself with the entry of aliens who have beliefs that are Marxist or Communist in nature, it created an exceedingly comprehensive screen-

ing process. In effect by requiring all aliens in subsection (a)(28) to apply for waivers, Congress saw to it that a thorough evaluation of the alien's background and purposes for entry would be made by the Departments of State and Justice in their respective areas of foreign affairs and internal security. The system thus established, screens out those about whom there is any basis for finding that entry would be detrimental to national interests and permits temporary entry of desirable aliens under strictly controlled circumstances.

Clearly, to vest appellants with a wholly unlimited power, one that can be exercised arbitrarily, would defeat the very foreign policy objectives which Congress intended the waiver provision to achieve. It would hardly be condusive to the negotiation of reciprocal privileges for Americans with other nations if appellants were not bound by the terms of their authority to carry out their side of the arrangement.

Appellants' practice under the waiver power is the most authoratative interpretation of it, particularly where, as here, Congress has been given specific notice of such practice and has refused to alter it.[17] See *Red Lion Broadcasting Co. v. FCC, supra* at 381. In granting the overwhelming majority of waiver applications made by aliens classified under §212(a)(28), appellants confirm that the provision was intended to be a mechanism for the controlled entry of aliens like Dr. Mandel, not for arbitrary or wide-scale denials. It is assumed that appellants carefully screened each application to prevent entry that would be harmful to national interests.

There is no legislative history that supports appellants' interpretation. Rather, the history on this point indicates clearly that Congress contemplated the granting of waivers on a regular basis for the "temporary admittance of otherwise inadmissible aliens both for humane reasons or for reasons of public interest." See S. Rept. No. 1137, *Committee on the Judiciary*, 82d Cong., 2d Sess., p. 12 (1952); Gordon and Rosenfield, *Immigration Law and Procedure*, §2.53(b), pp.

17. The Attorney General is instructed to make a detailed report to Congress in any case where a waiver is granted. See §212(d)(6).

2-245-246. There can be no doubt that by providing for admission in the "public interest" Congress sought, among other purposes, to serve the important First Amendment interests asserted here, including the fundamental right of the people to the uncensored flow of information and the maintenance of open and free academic debate. Cf. *Red Lion Broadcasting Co. v. FCC, supra* at 390.

Again, the actual application of the provisions involved supplies confirmation. Thus in 1969, the Immigration and Naturalization Service reported that with respect to all categories of inadmissible aliens described by §212(a), "6,236 waivers [4984 to aliens classified under §212(a)(28)] were granted to nonimmigrants whose admission was found to be in the public interest." 1969 Annual Report, p. 8. In this case, after determining that Dr. Mandel had not knowingly violated his visa conditions in 1968, the Department of State recommended the granting of a waiver "in the interest of free expression of opinion and exchange of ideas . . ." (App. 48). In 1968, Dr. Mandel was admitted solely for the purpose of participating in academic meetings at more than 30 universities in the United States. (App. 68) Moreover, it is significant that the Department of Justice has adopted regulations which provide for the automatic admission, upon a recommendation by the Secretary of State, of groups of aliens otherwise inadmissible under §212(a)(28) along with their families for the specific purposes of attending international conferences held in this country. See 8 C.F.R. §212.4(d).

In accordance with the screening process Congress created, appellants at various stages expressed the view that while Dr. Mandel's admission would serve the public interest, his activities in 1968 warranted denial of his 1969 waiver applications. These alleged violations of visa conditions were abandoned, obviously because appellants recognize them to be baseless. But, their assertion, alone, indicates quite clearly that appellants recognize the requirement to have reasons for denying a waiver to an alien whose admission serves the "public interest."

In sum the screening process Congress has established provides for treatment of aliens like Dr. Mandel in a manner that is fully consistent with the requirements of the First Amendment. Where, as here, appellants act to exclude an alien whose admission serves the "public interest" in the uncensored flow of information and the freedom of academic debate and inquiry, without any reason or for an illegitimate reason, they not only exceed their vested authority and abuse their discretionary power, but they unjustifiably deprive citizens of basic First Amendment rights.

III

An Exercise Of The Exclusion Power That Unjustifiably Disrupts And Prevents Academic Meetings In This Country Is Subject To Review Under First Amendment Standards At The Instance Of Affected American Citizens.

Appellants final argument is that regardless of whether their action violates First Amendment rights of citizens, it is not subject to review by the judiciary.

A series of exclusion and expulsion cases is cited for support, but those cases involve claims of right by aliens only and are inapposite. Aliens who have not been admitted have no First Amendment rights.[18] This is true of Dr. Mandel. But

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18. This was the holding in *Turner v. Williams*, 194 U.S. 279. The Court concluded that an alien who enters the country illegally has no basis on which to claim that deportation deprives him of his freedom of speech.

It should be noted, however, that resident aliens are afforded substantial constitutional protections, including the safeguards of the Due Process Clause of the Fifth Amendment and the guarantees of the First Amendment. See *Harisiades v. Shaughnessy*, 342 U.S. 580, (applying the test established by *Dennis v. United States*, 341 U.S. 494) see also *Bridges v. Wixon*, 326 U.S. 135, 148; *Galven v. Press, supra*. Indeed, the earliest cases recognize that however great the powers of exclusion and expulsion, they nevertheless may not be exercised in conflict with other provisions of the Constitution. See *The Chinese Exclusion Case*, 130 U.S. 591, 604; *Fong Yue Ting v. United States*, 149 U.S. 698, 711, 713.

In any event, if the broader language of *Turner* and *Galven* suggests a narrow reading of the First Amendment, it should be discounted by the fact that the government interest asserted was never tested against the rights of anyone but aliens.

this case exclusively concerns the rights of American citizens. Here an alien's exclusion has seriously impaired the First Amendment right of citizens to hold academic discussions and to receive information. Planned meetings were disrupted and specific invitations or contemplated discussions were precluded. In this case the First Amendment interests of affected Americans have crystalized to the point where these citizens have legal standing to challenge appellants' action that has deprived them of basic rights.

Appellants contend that the court below erred because Congress has the exclusive power to formulate "[p]olicies pertaining to entry of aliens and their right to remain here . . ." *Galvan v. Press, supra* at 531. But this misses the point of the court's decision entirely. Of course the courts lack power to make or review the wisdom of immigration policies. The sole duty of the federal judiciary in a case like this one, as the court below ruled, is to determine whether a specific policy is within the power of Congress to enact and is otherwise in harmony with basic liberties guaranteed to the People. See *United States v. O'Brien, supra.*

In a consistent line of decisions over a period of many decades, this Court has rejected claims by government officials, like those made by appellants, that their operations are exempt from judicially enforceable, First Amendment limitations. Although these cases have frequently involved the assertion of governmental powers of the broadest dimensions — the war power, the power to maintain national security, the power to conduct foreign affairs, the power to regulate immigration — no suggestion lingers in any one of them to support the existence of a governmental power that is supra-constitutional in nature, whose mere assertion is justification for its exercise. Appellants effectively recognize the necessity of justifying Dr. Mandel's exclusion, although the justifications they offer are not relevant or responsive to the issues in this case. See Gov. Br. pp. 36-37.

As stated in *United States v. Robel, supra* at 264: "When Congress' exercise of one of its enumerated powers clashes

with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated." The dissent by Justice White expresses agreement with this principle. Although reaching a different result with respect to the statute involved, the dissent rejects the argument made here that an exercise of the war power is a matter of unreviewable policy.

Robel concerned a statute that made it a criminal offense for any employee of a "defense facility" to remain a member of the Communist Party, regardless of the quality or degree of membership involved. The Court overruled a claim that a statute of such breadth was justifiable as an exercise of Congress' war power. The Court held: "The phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of Congressional power which can be brought within its ambit. [E]ven the war power does not remove constitutional limitations." 389 U.S. at 263-264. See also *Schneider v. Smith, supra; United States v. O'Brien, supra.*

Likewise, *Zemel v. Rusk, supra* at 17, unqualifiedly rejected any assumption "that simply because a statute deals with foreign relations, it can grant the executive totally unrestricted freedom of choice."

Similarly, in *New York Times Co. v. United States, supra,* the government asserted its "sovereign prerogative" over foreign affairs and national security as the basis for seeking an injunction against publication by several newspapers of certain "Top Secret" classified documents. There, as here, the First Amendment right of the people to receive information was at stake. This right was represented in Court by the newspapers, which claimed no right of their own to obtain, receive or possess the allegedly stolen documents. Significantly, and by contrast with this case, the government did not rest on a bare assertion of "sovereign prerogative" or even the strong inference of compelling interest that inheres in a "Top Secret" classification. Quite the contrary, the government made an extensive evidentiary showing that release of the particular

documents would so directly, immediately and irreparably damage national interests that prior restraint was warranted.

The position taken by the government in this case, that the decision to exclude is not subject to judicial inquiry, was implicitly rejected by every member of this Court in the *New York Times* case. As Justice Harlan said in his dissenting opinion, joined by the Chief Justice and Justice Blackmun: "Constitutional considerations forbid a complete abandonment of judicial control. Cf. *United States v. Reynolds*, 345 U.S. 1, 8 (1953)." 403 U.S. at 757. Moreover, even if Congress had enacted a law authorizing the Government to restrain publication of information that would endanger national security or the effectuation of foreign policy, as Mr. Justice Stewart, joined by Mr. Justice White said, "the courts would likewise have the duty to decide the constitutionality of such a law as well as its applicability to the facts proved." 403 U.S. at 730.

In *Kent v. Dulles*, 357 U.S. 116 and *Aptheker v. Secretary of State*, 378 U.S. 500, the government unsuccessfully sought to defend the denial of passports to members of the Communist Party on the basis of the same powers asserted here. But in both *Kent* and *Aptheker*, in contrast to this case, the government did not claim that the exercise of these powers was unreviewable. Although this was the position of the government prior to these cases, in *Kent* the government specifically conceded its error in contending that policy pertaining to the issuance or denial of passports is "a purely political matter." This contention, the government acknowledged, had been correctly rejected in *Shachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955). See Brief for Government in *Kent v. Dulles*, p. 26.

Moreover, in *Robel, Zemel, Kent, Aptheker* and other similar cases, the government at least attempted to show that its action was reasonably related to the achievement of a legitimate governmental interest. See also *Teague v. Regional Commissioner, supra*. By contrast, in this case, as in *Lamont v. Postmaster General*, no government interest is asserted or is evident, other than to prevent or impede the communication

of political doctrine that does not meet with government approval.

Appellees' right to academic freedom and the public interest in the free flow of information are of equal stature with the First and Fifth Amendment rights asserted in cases like *New York Times Co., Robel, Kent, Aptheker, Lamont* and *Zemel*. If the exercise of foreign relations and national security powers is subject to review in those cases, then the exercise of the exclusion power is subject to review at the instance of American citizens in this case.

CONCLUSION

The court below correctly enforced the First Amendment rights of American citizens to meet and hold academic discussions with Dr. Mandel, an alien scholar. The exclusion of Dr. Mandel serves no legitimate purpose. Neither Congress nor the Constitution has authorized appellants to take such unjustified action, where the direct and immediate result is the disruption or preemption of academic meetings and discussions at American universities. For these reasons the judgment of the district court should be affirmed.

Respectfully submitted.

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April 4, 1972